

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
MIDLAND-ODESSA DIVISION

ROBERT C. SMITH,  
*Plaintiff,*

v.

ARMY BOARD FOR CORRECTIONS  
OF MILITARY RECORDS and RYAN  
D. MCCARTHY, SECRETARY OF THE  
ARMY,  
*Defendants.*

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Case No. MO:17-CV-00031-DC

**ORDER STAYING CASE AND TO RETAIN COUNSEL OR PROCEED PRO SE**

BEFORE THE COURT is Plaintiff Robert C. Smith's Notice of Death of Attorney G. Ward Beaudry. (Doc. 32). This case is before the undersigned U.S. Magistrate Judge by consent of the parties in accordance with 28 U.S.C. § 636(c) and Federal Rule of Civil Procedure 73. (Doc. 25). Plaintiff's Notice informs the Court that Plaintiff's Counsel passed away on November 28, 2017. (Doc. 32). Plaintiff requests the Court abate the case until Plaintiff obtains new counsel. (*Id.*).

The Court considers Plaintiff's request for abatement as a request for a stay of proceedings. "Although the term 'abatement' is sometimes used loosely as a substitute for 'stay of proceedings' . . . abatement of the action is [granted] as a matter of right, but a stay is granted in the court's discretion." *Spira Footwear, Inc. v. LeBow*, No. EP-08-CV-55-KC, 2009 WL 10669440, at \*2 (W.D. Tex. Jan. 16, 2009) (quoting Black's Law Dictionary 3 (8th ed. 2004); 1 Am. Jur. 2d *Abatement, Survival, and Revival* § 3 (1994)) "A stay is also distinct from an abatement in that to abate a suit is to destroy the abated action, whereas a stay is merely a temporary suspension of proceedings and is not a dismissal . . . ." *Id.* (quoting 1 Am. Jur. 2d

*Actions* § 68 (1994)). Plaintiff does not invoke a right to abate the case and instead requests the Court suspend the action. Therefore, the Notice is a request for a stay of proceedings.

The Court **STAYS** the case for a period of **thirty (30) days**. Additionally, the Court **ORDERS** Plaintiff to obtain new counsel **or** prepare to proceed *pro se*. Plaintiff **shall** file a Motion to Substitute Counsel if Plaintiff secures new counsel.

It is so **ORDERED**.

SIGNED this 16th day of January, 2018.

A handwritten signature in black ink, appearing to read 'David Counts', with a stylized star-like flourish at the end.

DAVID COUNTS  
UNITED STATES MAGISTRATE JUDGE